INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	5
Statement	5
No. 906	5
Nos. 905, 917	12
Argument	21
A. No. 906	21
B. Nos. 905, 917	24
Conclusion	32
Appendix	34

CITATIONS

Cases:

J. I. Case Co. v. *National Labor Relations Board*, 321 U. S. 332 — 22

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197 — 21

Federal Trade Commission v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257 — 22

Franks Bros. Co. v. *National Labor Relations Board*, 321 U. S. 702 — 30

Marshall Field & Co. v. *National Labor Relations Board*, 318 U. S. 253 — 22

May Department Stores Co. v. *National Labor Relations Board*, 326 U. S. 376 — 22, 23, 24, 29

National Labor Relations Board v. *Appalachian Electric Power Co.*, 140 F. (2d) 217 — 31

National Labor Relations Board v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282, reversing, 116 F. (2d) 350 — 27

National Labor Relations Board v. *Century Oxford Manufacturing Corp.*, 140 F. (2d) 541, certiorari denied, 323 U. S. 714 — 30

National Labor Relations Board v. *Cheney California Lumber Co.*, 327 U. S. 385 — 22

National Labor Relations Board v. *Clinchfield Coal Corp.*, 145 F. (2d) 66 — 28

National Labor Relations Board v. *Express Publishing Co.*, 312 U. S. 426 — 22, 23

730259—47——1

Cases—Continued Page

National Labor Relations Board v. *Falk Corp.*, 308 U. S. 453 32

National Labor Relations Board v. *Jersey Maid Corp.* (entered May 2, 1941; unreported) 30

National Labor Relations Board v. *Keystone Steel & Wire Co.*, No. 544, this Term, certiorari granted November 12, 1946 ..... 28, 32

National Labor Relations Board v. *Link-Belt Co.*, 311 U. S. 584 ..... 27, 29

National Labor Relations Board v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241 ..... 10, 27

National Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261 ..... 10, 22

National Labor Relations Board v. *Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50 ..... 26, 27, 28

Republic Aviation Corp. v. *National Labor Relations Board*, 324 U. S. 793 30

The Tappan Stove Company, Matter of, 66 N. L. R. B. 759 30

United States v. *Joseph Ryzicka et al.*, No. 54, this Term 32

Virginia Electric & Power Co. v. *National Labor Relations Board*, 319 U. S. 533 27

Western Electric Co. v. *National Labor Relations Board*, 147 F. (2d) 519, certiorari denied, 324 U. S. 870 28

Westinghouse Electric & Mfg. Co. v. *National Labor Relations Board*, 312 U. S. 660, affirming *per curiam*, 112 F. (2d) 657 27

Statutes:

Federal Administrative Procedure Act of 1946 (c. 324, Public Law 404, 79th Cong., 2d Sess.) 31

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151 *et seq.*):

Section 7 ..... 23, 34

Section 8 (1) 34

Section 8 (2) 34

Section 10 (c) 34

Section 10 (e) 35

Section 10 (f) 35

Miscellaneous:

National Labor Relations Board, Tenth Annual Report (Gov't Printing Office, 1946), pp. 10, 86, 87 31

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 905

NEPTUNE METER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 906

NEPTUNE METER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 917

INDEPENDENT EMPLOYEES' ASSOCIATION OF THE NEPTUNE METER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinions in the court below (ERO R. 465–485; IEA R. 753–773) have not yet been reported.

The findings of fact, conclusions of law and order of the National Labor Relations Board in No. 906 (ERO R. 1–24) are reported in 58 N. L. R. B. 1240, and those in Nos. 905 and 917 (IEA R. 670–700) are reported in 66 N. L. R. B. 292.

The court below entered a single opinion (ERO R. 465–485; IEA R. 753–773) covering all the proceedings now before this Court upon the petitions for writs of certiorari filed herein.

For convenience, references to the record in No. 906 are designated "(ERO R. —)"; references to the record in Nos. 905 and 917 are designated "IEA R. —)".

JURISDICTION

The decrees of the court below (ERO R. 486–487; IEA R. 774–777) were entered on December 20, 1946. The respective petitions for writs of certiorari were filed on January 17, 1947, in Nos. 905 and 906 and on January 20, 1947, in No. 917. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

IN NO. 906

1. Whether enforcement proceedings under the National Labor Relations Act are rendered moot by virtue of an employer's compliance, prior to

the institution of enforcement proceedings, with an order of the National Labor Relations Board directed against it.

2. Whether in enforcement proceedings under the Act an employer and the reviewing court are, respectively, precluded from raising or entertaining the issue of the propriety of a Board order directed against the employer where the order adopts the recommendations of the trial examiner and the employer took no exception thereto before the Board.

3. If the foregoing question is answered in the negative, whether the Board, upon finding that an employer in violation of Section 8 (2) and (1) of the Act has dominated every aspect of the organizational life of its employees over an extended period of time, may properly order the employer to cease and desist from "in any other manner" interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act.

IN NOS. 905, 917

1. Whether, where one labor organization succeeds in point of time an employer-dominated labor organization under the sponsorship and leadership of officers and representatives of the predecessor organization, and the employer has failed, prior to the formation of the second organization, to withdraw recognition from, and disestablish, the earlier organization as the collective

bargaining representative of its employees and thereafter evinces favoritism for the second organization, the court below properly held that the Board's conclusion that the second organization is employer-dominated in violation of Section 8 (2) and (1) of the Act is a rational inference supported by substantial evidence and therefore conclusive.

2. Whether, upon a showing that an employer has dealt with three successive labor organizations existing in violation of the Act, the Board may order the employer to cease and desist from recognizing or dealing with any labor organization as the collective bargaining representative of its employees unless and until such labor organization shall have been certified by the Board as such representative.

3. Whether the Federal Administrative Procedure Act of 1946 is applicable to the instant proceedings, all of which were pending prior to its enactment; and, if applicable, whether it requires a result different from the one reached by the court below.

4. Whether a Board order requiring an employer to withdraw recognition from, and completely disestablish, an employer-dominated labor organization, represents a proper exercise of the Board's power.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, pp. 34–35, *infra*.

STATEMENT

NO. 906

Upon the usual proceedings under Section 10 of the Act, the Board on October 21, 1944, issued its findings of fact, conclusions of law and order (ERO R. 1–24). The facts as found by the Board and as shown by the evidence may be summarized as follows:[1]

In 1919, petitioner, The Neptune Meter Company, hereinafter called the Company, initiated, sponsored and financed the formation of an employee representation plan for its employees known as the Congress of Neptune Meter Company, hereinafter called the Congress (ERO R. 7–8; 26–27, 28–37, 113–114). The Congress consisted of the House, composed of representatives of non-supervisory employees, the Senate, representing supervisory employees, and the Cabinet composed of representatives of higher management in whom the executive power of the Congress was vested (ERO R. 8–9; 33–34, 119–

[1] In the following statement, the references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

126). Proposals passed by the House, and concurred in by the Senate, relating to wages, hours, or working conditions as well as amendments to the organization's constitution became effective only with the approval of the management representatives in the Cabinet (ERO R. 9; 47–53, 124, 126). Membership in the Congress of all employees was automatic and conferred only the right to vote in an annual election of representatives (ERO R. 8; 44–45, 85–103). It carried no obligation to pay dues (ERO R. 8; 42–43). No provision was made for participation in the affairs of the Congress by the employees generally. No meetings of the general membership were held (ERO R. 8–9; 38). The House officers were elected, not by the employees generally, but by the representatives (ERO R. 9; 124).

The Company paid various expenses of the Congress and furnished it with various items (ERO R. 9; 40, 41, 45–46, 55–58, 100). It paid the representatives for all time spent in meetings of the organization or on other business of the Congress (ERO R. 9; 41–42, 58–59, 90–93, 131). All meetings and business of the Congress were conducted on the Company's premises (ERO R. 9; 39–40, 54).

On August 1, 1935, A. H. Ricketts, then vice president and manager of the Company, appeared at a meeting of the House and informed the representatives that the provisions of the then re-

cently-enacted National Labor Relations Act made it unlawful for an employer to contribute financial or other support to a labor organization and that, accordingly, the so-called system of "industrial democracy" then in effect at the plant would be "discontinued." Ricketts did not advise the Congress representatives or the employees at large that the Company would no longer recognize or deal with the Congress as their collective bargaining agent. Instead, he informed the representatives that the employees had a "perfect right," if they so desired, "to continue the representative plan as it is now being carried on" and that in order to facilitate its continued functioning, the Company would, as in the past, permit the employees to hold their meetings in the plant and on company time (ERO R. 10–11; 53–54, 67, 97–100). Ricketts' suggestions were thereafter conveyed to the employees (ERO R. 11; 100).

Thereafter, representatives and officers of the Congress, which continued to function, undertook the task of revamping it. After it was ascertained by means of a poll which they conducted among the employees at the plant during working hours that the latter were satisfied with the type of organization and representation then in existence at the plant (ERO R. 12–13; 68–73, 106–107, 269), the president of the House, on September 9, appointed a committee to draft a constitution (ERO R. 13; 73–74, 107). The committee selected

730259—47——2

the name, Employees' Representation Organization, hereinafter called the ERO, for the revised representation device and prepared a constitution. On October 21, 1935, the House, after amending the draft of the proposed constitution in various respects, adopted it (ERO R. 13; 73–78, 100–102, 107–108). The employees generally were afforded no opportunity to consider, adopt or reject any provision of the revised constitution other than the preamble and platform set forth in it (*ibid.*).

Under this constitution, the organic structure of the ERO did not, except for the elimination of the patently illegal employer participation which had marked the Congress, differ materially from that of the latter. Like that of the Congress, the ERO constitution provided for automatic membership of all employees (ERO R. 14; 84–85, 103, 62–63). No membership meetings or dues payments were provided for, and, in fact, no general meetings were held; nor were any dues ever collected by the ERO (ERO R. 14; 67, 80, 102). As in the Congress, representatives forfeited their office upon a permanent transfer from the department which had elected them or upon the termination of their employment (ERO R. 14; 86–87).

The Company continued to extend to the ERO the support and assistance which it had previously accorded to the Congress. It continued to

permit meetings of the ERO on company property during working hours (ERO R. 14; 54, 60, 66, 81, 92). It paid the representatives of the ERO for time spent in conducting its affairs or transacting its business during working hours (ERO R. 14–15; 62, 60, 65–66, 81, 90–91, 131). It also permitted ERO elections to be conducted on its premises and during working hours (ERO R. 15; 81–83). It furnished various kinds of supplies to the ERO and permitted it to make free use of its printing and mimeographing machines (ERO R. 15; 61–62, 65–66, 82–83, 91–92). In 1937, the Company entered into a collective bargaining agreement with the ERO.[2] Similar agreements were executed in the years following (ERO R. 15; 102–103, 108–109, 110–111).

Upon the foregoing facts the Board's trial examiner found (ERO R. 4–19) in his intermediate report, dated September 6, 1944, that the Company in violation of Section 8 (2) and (1) of the Act had dominated and interfered with the administration of, and contributed support to, the Congress and dominated and interfered with the formation and administration of, and contributed support to, its successor, the ERO. Accordingly, he recommended (ERO R. 22–23)

[2] The record discloses that in 1937 when this contract was executed, another labor organization had begun organizational activities among the Company's employees (ERO R. 102, 110–111).

that the Company cease and desist from its unfair labor practices with respect to the ERO[3] and withdraw recognition from, and completely disestablish, it as the collective bargaining representative of its employees. The trial examiner also recommended (ERO R. 22–23) that the Company cease and desist from—

> In any other manner interfering with, restraining or coercing its employees in the exercise of the rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

On October 21, 1944, the Board (ERO R. 1–3) issued its decision and order adopting the findings, conclusions and recommendations of the trial examiner.[4] The Board's order (ERO R. 2–3) is in all respects similar to that recommended

[3] Since the Congress had been dissolved and there was no likelihood of its reestablishment, the trial examiner made no recommendations with respect to it (ERO R. 20).

[4] The Board, like the trial examiner (ERO R. 1, 10), made no findings of unfair labor practices with respect to the Congress based on events which occurred prior to July 5, 1935, the effective date of the Act, but it properly considered them as relevant background for its findings. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 268–270; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 249–250.

by the trial examiner save for the following underscored addition in the general cease and desist provision:

> In any other manner interfering with, restraining or coercing its employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist *United Electrical, Radio & Machine Workers of America, affiliated with the C. I. O., or any other* labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

Following both the issuance of the trial examiner's intermediate report and the Board's decision and order, the Company on September 21, and again on October 31, 1944, posted notices at its plant, stating that it would comply with the trial examiner's recommendations and the Board's order (ERO R. 452, 459–460).

On June 4, 1946, the Board filed in the court below a petition to enforce its order (ERO R. 441–444). On November 29, 1946, the court entered its opinion (ERO R. 465–485) in which it held, *inter alia,* that the Board's findings with respect to the Congress and ERO were supported by substantial evidence (ERO R. 469). The court also held that the Board's order had not become moot by reason of the Company's posting of no-

tices in compliance with the recommendations of the trial examiner and the order of the Board (ERO R. 482). The court, accordingly, enforced the Board's order, as modified in a manner not here material (ERO R. 482, 484). On December 20, 1946, the court entered its decree enforcing the Board's order, as modified (ERO R. 486–487).

NOS. 905, 917

Upon the usual proceedings under Section 10 of the Act, the Board on March 6, 1946, issued its findings of fact, conclusions of law, and order in the proceedings now pending before this Court on petitions for writs of certiorari in Nos. 905 and 917 (IEA R. 670–700). The facts as found by the Board and as shown by the evidence may be summarized as follows:

On June 8, 1944, the Board issued its complaint in the proceedings before this Court in No. 906, alleging that the Company's conduct with respect to the Congress and the ERO was violative of Section 8 (2) and (1) of the Act (ERO R. 4–5). A copy of this complaint was served on President Landi of the ERO (IEA R. 681; 38–40, 494). On June 15, 1944, Landi summoned the organization's representatives and notified them that their practice of conducting ERO meetings on the Company's premises might be violative of the Act (IEA R. 681; 494). The representatives thereupon voted that in the event the Board, as a result of the proceedings pending before it, or-

dered the ERO to discontinue holding meetings on the Company's property, they "proposed to hold [their] future meetings on the outside and continue to hold the Organization in its existence." It was also decided to take a poll of the employees to ascertain whether or not they "still want to carry on with our present Organization by holding meetings on the outside" (IEA R. 681; 20–22, 40–41, 45–46, 494–495).

On June 20, a notice was posted in the plant over the signature of Landi as president of the ERO stating that the representatives of the ERO had been instructed to take a vote among the employees to determine whether or not they wished to "continue with the present Employees' Representative Organization with meetings being held on the outside" (IEA R. 681–682; 47–48, 498). The poll was conducted by ERO representatives during working hours in the plant and resulted in a large number of employees voting in the affirmative (IEA R. 682; 50–51, 109–110, 496–497).

Following this poll, Landi, at a meeting held on plant premises during working hours, designated various representatives of the ERO as members of an Organizing Committee in order to draft "plans" in accordance with the expressed wishes of the employees "to continue our Organization with meetings to be held on the outside" (IEA R. 682; 54–60, 497). The employees were then notified of this action and the names

of the committee's members were posted on the plant bulletin boards (IEA R. 682; 55).[5]

From July 10 to July 12, the Board conducted a hearing on its complaint concerning the Congress and ERO. Various representatives and officers of the ERO attended the hearing, among them the members of the Organizing Committee appointed by Landi (IEA R. 683; 221–222, 243). During the course of the hearing the members of this committee, now joined by Secretary Dauwalter and representative Morgan of the ERO (IEA R. 63–64), concluded that on the basis of the testimony adduced at the hearing, it was doubtful whether the ERO met the requisite standards prescribed by the Act and that it would be necessary, therefore, to form a "new" organization in order to comply with the statute (IEA R. 683; 222–226, 227–228).

On July 13, 1944, the day following the close of the Board hearing, this group of employees again met. They constituted themselves as the "Organizing Committee." Under the chairmanship of Koopman, who had been chairman of the

[5] According to Landi and Koopman, who was also appointed to the original organizing committee, this committee never functioned (IEA R. 682; 60, 220–221). It is undisputed, however, as the Board found (IEA R. 682), that the same persons named by Landi as the Organizing Committee, with the addition of Secretary Dauwalter and representative Morgan of the ERO, subsequently became the chief organizers of the ERO's successor and designated themselves as the "Organizing Committee".

ERO Grievance Committee since 1942, and had been otherwise prominently identified with it from its inception (IEA R. 683; 223–226, 237–238), it was agreed to form "a brand new organization" and to solicit initiation fees of one dollar from each of the employees to finance it. (IEA R. 683; 118–119, 229). On the same day, a drive was instituted to collect initiation fees from the employees and within a few days the Committee and those designated to assist it collected approximately $700 (IEA R. 683–684; 245). A portion of this sum was collected by one member of the Committee at the plant during working hours (IEA R. 671–684; 113–114, 229). These fees were turned over to Secretary Dauwalter of the ERO (IEA R. 684; 235).

Thereafter, Koopman asked President Landi of the ERO to call a special meeting of its representatives (IEA R. 685; 228–229). At this meeting, held on July 19, 1944, the representatives were informed that "a brand new organizing committee" had been formed and that no further meetings of the ERO would be held (IEA R. 685; 229, 292). No formal action was taken dissolving the ERO (IEA R. 685; 292–293). Nor were the employees generally given formal notice that the ERO had been discontinued;[6] the

[6] Employees had been generally informed of the action of ERO representatives by the posting of the minutes of their meetings (IEA R. 681; 48). No minutes of the meeting of July 19 were taken or posted (IEA R. 685; 268, 293).

results of the meeting of July 19 were reported orally to the employees by the representatives who had been present (IEA R. 685; 269).

Thereafter, Koopman and other members of the Organizing Committee proceeded to perfect the formal organization of the Independent Employees Association of the Neptune Meter Company, hereinafter called the IEA (IEA R. 685; 141–143). They selected its name (IEA R. 685; 270–271). They caused membership cards to be printed and distributed to the employees who had already paid their initiation fees (IEA R. 685; 117, 269–270, 574). On August 29, the Organizing Committee distributed notices signed by the committee members, informing the employees that "the initial organization meeting of the newly formed Neptune Employees Association" would be held the following night (IEA R. 685–686; 499). At that meeting, Koopman presided. He informed the employees present that the Organizing Committee had been originally established to reorganize the ERO so as to eliminate the use of company time and property but that it had been subsequently decided to form "a brand new independent organization." The Organizing Committee, he further reported, had undertaken the task of organizing a union "with the conviction that the ERO was a thing of the past." (IEA R. 686; 517–518). Temporary officers of the IEA were then elected (IEA R. 686; 520–522). The Board found that two of these

temporary officers, Rita Mazeika and Vincent Dauwalter, who were elected, respectively, secretary and treasurer of the IEA, had been ERO officers (IEA R. 686; 70, 521–522).[7]

On September 7, 1944, the IEA informed the Company that it represented a majority of the employees at the plant and requested a conference for the purpose of establishing its representative status and obtaining recognition (IEA R. 687; 592).[8] On September 14, the Company informed the IEA that it would not recognize it because of the proceedings then pending before the Board with respect to the ERO (IEA R. 687; 325, 387–388).

Meanwhile, the Board's trial examiner had on September 6, 1944, issued his intermediate report finding that the ERO and its predecessor, the Congress, were company-dominated labor organizations and recommending that the Company disestablish the ERO (IEA R. 680; 474–493). On September 21, the Company for the first time posted notices purporting to disestablish the ERO (IEA R. 680–681; 388–389, 605–612). On October 4, 1944, the constitution and by-laws of the

[7] The record also shows that Harry Furbank, who was chosen president, had been representative of the ERO in 1935, and for five years preceding that he had served as a representative of the Congress, the illegal predecessor of the ERO (IEA R. 521, 65–68). Similarly, John Connors, vice-president of IEA, had served on the ERO Grievance Committee in 1944 (IEA R. 69, 521).

[8] The Board inadvertently misstated the date of this communication as September 5, 1944.

IEA, which had been previously prepared, were read at a meeting of the employees and adopted (IEA R. 687; 523).

On October 9, 1944, the IEA renewed its request for recognition (IEA R. 688; 593).[9] On October 12, a meeting was held attended by the representatives of the Company, the temporary officers of the IEA, and Koopman and others who had been prominently identified with the ERO. In the course of this meeting, the Company, after first refusing to do so, finally agreed to recognize the IEA upon proof of its majority status (IEA R. 688–689; 276–282, 389–392). Thereafter, on October 14, the IEA submitted membership cards and these were checked against the Company's payroll. On the basis of this check, it appeared that the IEA had been designated by a majority of the Company's employees and thereupon the Company recognized it as the exclusive bargaining agent of its employees (IEA R. 689; 316–317, 394, 543).

A week later, on October 21, the Board issued its decision and order adopting the trial examiner's recommendations with respect to the ERO (IEA R. 681; 471–473). The Company again posted notices stating that it was disestablishing the ERO and that it would no longer recognize it as the collective bargaining represent-

[9] The Board inadvertently misstated the date of this communication as October 5, 1944.

ative of its employees (IEA R. 681; 395–396, 613–618).

Prior to the recognition of the IEA, the International Molders and Foundry Workers of America, A. F. of L. (herein called the Molders) had requested that the Company recognize the Molders as the bargaining representative of the employees in the Company's foundry (IEA R. 687; 201–203). In contrast to the Company's action in recognizing the IEA merely on the basis of an informal check of its membership cards against the Company's payroll, the Company stated that it would not recognize the Molders unless it was first certified by the Board as the representative of the foundry workers (IEA R. 687; 203).

Following the Company's recognition of the IEA, bargaining negotiations were held which resulted in the execution of a collective bargaining agreement, effective January 1, 1945 (IEA R. 690; 172, 396–397). The contract, which was for one year's duration and automatically renewable thereafter from year to year unless notice to the contrary was given, included an exclusive recognition clause, provision for voluntary check-off of dues, and other clauses dealing with wages and hours of work (IEA R. 690; 575–591).

Upon the foregoing facts, the Board reaffirmed its earlier findings with respect to the Congress and the ERO and concluded (IEA R. 670–671,

679–681, 691–695) that in the light of (a) the Company's failure to disestablish the ERO prior to the formation of the IEA, particularly in view of the fact that the Company had from 1919 to 1944 dominated the organizational life of its employees, and (b) the initiation and sponsorship of the IEA by a group of ERO officers and representatives, a circumstance which strongly tended to suggest to the employees a substantial identity between the two organizations, the employees "would reasonably conclude 'that the company approved the new [i. e. the IEA] as it did the old' organization and that their choice was 'for that reason not as free as the statute demands' ". The Board also found (IEA R. 694–695, 670–671) that, in the circumstances related above, the Company's recognition of the IEA as the exclusive bargaining representative of its employees and the subsequent execution of a contract with it constituted unlawful assistance within the meaning of the Act. Upon these findings the Board ordered (IEA R. 673–674) the Company to cease and desist from its unfair labor practices, to withdraw recognition from and disestablish the IEA as collective bargaining representative of its employees and to post the usual notices. It also ordered the Company (IEA R. 673–674), in view of its persistent predilection for treating with organizations existing in violation of Section 8 (2) and (1) of the Act, as reflected in its past conduct, to cease and desist from recognizing or

dealing with any labor organization unless and until such labor organization shall have been first certified by the Board as collective bargaining representative of the employees.

On April 26 and May 4, 1946, the Company and the IEA filed in the court below separate petitions to review and set aside the Board's order (IEA R. 727–747). On June 4, 1946, the Board filed its answer and request for enforcement of its order (IEA R. 748–752). On November 29, 1946, the court below entered its opinion (IEA R. 753–773), one judge dissenting, in which it held, *inter alia,* that the Board's findings with respect to the IEA were supported by substantial evidence (IEA R. 763–770) and directed that the Board's order as modified in a manner not material here, be enforced (IEA R. 770–772). On December 20, 1946, the court entered its decree enforcing the Board's order, as modified (IEA R. 774–777).

ARGUMENT

A. NO. 906

1. The Company contends (Pet. 8–9) that the court below erred in enforcing the Board's order with respect to the Congress and the ERO because both prior to and after the issuance of the Board's order, it had voluntarily complied with the requirements of the order, thereby rendering enforcement proceedings moot. This contention is foreclosed by the settled decisions of this Court. *Consolidated Edison Co.* v. *National Labor Rela-*

tions Board, 305 U. S. 197, 230; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 271; *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332, 334; cf. *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.,* 304 U. S. 257, 259–260.

2. The Company also asserts (Pet. 9–12) that the provision of the Board's order which restrains it from in any manner infringing the rights guaranteed to employees by Section 7 of the Act is invalid under *National Labor Relations Board* v. *Express Publishing Co.,* 312 U. S. 426, and *May Department Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376. However, the Company is precluded from raising this issue. *National Labor Relations Board* v. *Cheney California Lumber Co.,* 327 U. S. 385; *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253. The trial examiner in the instant proceedings made the recommendation, which the Board adopted (*supra,* pp. 10–11), that the order contain a broad injunction.[10] The Company filed no exceptions to the intermediate report; indeed, it took steps purporting to comply with it (*supra,* p. 17).

[10] The Company's contention (Pet. 11) that the Board's order differs in this respect from the order proposed by the trial examiner and that it, therefore, had no opportunity to object to the order as finally entered by the Board, is insubstantial. As indicated above, pp. 10–11, the Board modified the recommended order by merely inserting therein the clause "* * * United Electrical, Radio and Machine Workers of America, affiliated with the C. I. O., or any other * * *".

3. Moreover, the Company's contention respecting the scope of the order is based upon a misinterpretation of the holdings in the *Express Publishing* and *May Department Stores* cases. This Court in the *May Department Stores* case, *supra,* 326 U. S. at 392, held that where an employer's conduct shows a persistent "attitude of opposition to the purposes of the Act to protect the rights of employees generally," the Board may guard against the threat of future varied attacks upon the employees' enjoyment of their rights under the Act, by incorporating in its order the broad cease and desist provision. Cf. *Express Publishing Co.* case, *supra,* at p. 437. That attitude, with its implicit threat of continued invasions of all of the rights guaranteed to employees under the Act, is found here. As the court below noted (ERO R. 478), the Company, as of the date of the Board's order, had uninterruptedly dominated every aspect of the organizational life of its employees for sixteen years prior to the passage of the Act and for an additional nine years following its enactment. This conduct was manifestly calculated to thwart all of the rights guaranteed to employees by Section 7 of the Act, that is to say, not only the "right to self-organization" but also the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other

mutual aid or protection". Hence, under the *May Department Stores* decision, the general cease and desist provision of the Board's order was properly enforced by the court below.

B. NOS. 905, 917

1. The Company (Pet. 17–20) and the IEA (Pet. 11–18) assert that the court below, in enforcing the Board's order with respect to the IEA, has misinterpreted the controlling decisions of this Court and improperly renounced its statutory authority to determine whether or not Board findings are supported by substantial evidence. These contentions are without merit.

An examination of the opinion of the court below will readily disclose that the court recognized that the principal question before it was whether the Board's decision rested upon substantial evidence (IEA R. 757); it reviewed in detail the Board's findings with respect to the IEA and expressly held that they were supported by substantial evidence (IEA R. 757–763). Summarizing these facts, the court stated (IEA R. 766–777):

> Thus, unquestionably, this employer, uninterruptedly, for some twenty-five years, dominated this two-named unions [i. e. the Congress and the ERO], and for the last nine of those years, from 1935 to 1944, did so unlawfully, in violation of § 8 of the Act. The pivotal issue for the Board was therefore whether this quarter of a century

of domination suddenly evaporated in 1944 with the creation of I. E. A. * * *

Prior to September 21, 1944—before which time the company had not in any way indicated a severance of its relations with its captive E. R. O.—these events had occurred: (1) A Committee consisting of E. R. O. officials and representatives organized I. E. A.; (2) this committee grew out of a committee which, a short time previously, had been appointed by the E. R. O. President; (3) this new committee collected I. E. A. initiation fees and paid them to the E. R. O. Secretary; (4) the E. R. O. President called a *special meeting of employees*; (5) the minutes of this meeting describe it as "the first meeting of the Independent Employees Association"; (6) Koopman, a prominent E. R. O. representative, presided at this "first meeting" of I. E. A.; (7) that same meeting elected as temporary officers of I. E. A. persons who had acted in official capacities in E. R. O. All this before the company took any steps to "disestablish" E. R. O. Moreover, subsequent to the first notice of "disestablishment" of E. R. O., the company refused to consider whether the Molders' union represented a majority of the molders in the company's employ, unless and until the Board certified that union; but, six days after this refusal, the company considered the majority status of I. E. A. without imposing a similar condition of Board certification.

The court then held that in view of the Company's failure to disestablish the ERO prior to the formation of the IEA in order to dissipate the effects of its long-continued domination of the employees' organizational life, the important role played by ERO officers in the formation and initial stages of the IEA, and the Company's show of favoritism for the IEA, the Board's ultimate conclusion that the IEA was a company-dominated labor organization in violation of the Act was a rational inference of fact and therefore conclusive (IEA R. 764–768).

This holding fully comports with the decisions of this Court. First, as was said in *National Labor Relations Board* v. *Southern Bell Telephone and Telegraph Co.*, 319 U. S. 50, 60,

> * * * the question of the weight to be given the passage of time or subsequent efforts to dissipate the effect of this early domination is for the Board. Its conclusion is an inference of fact which may not be set aside upon judicial review because the courts would have drawn a different inference.

Second, where, as here, a labor organization is initiated and sponsored by the officers and representatives of an employer-dominated labor organization, which immediately precedes in point of time the new organization, and the employer has failed, prior to the formation of the successor organization, to take adequate, timely steps to dis-

establish the illegal predecessor and, thereafter, evidences some favoritism for the successor organization, the Board may, as it did here, properly conclude upon the basis of all these circumstances that the new organization is company-dominated and order its disestablishment. *National Labor Relations Board* v. *Southern Bell Telephone and Telegraph Co.*, 319 U. S. 50, 56–60; *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, 312 U. S. 660, affirming *per curiam*, 112 F. (2d) 657, 660–661 (C. C. A. 2); *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 596–600. Nor is the Board precluded from reaching such a conclusion because the record may, as here, contain evidence indicating that the employees have expressed a preference for the successor organization, that the more patently illegal indicia of employer domination do not exist, and that the bargaining history of the successor organization has been aggressive and militant. This Court has repeatedly held that the Board may, as here, decline to give evidence of this character conclusive weight where the record contains countervailing evidence of employer-domination. *Southern Bell* case, at p. 60; *Link-Belt* case at pp. 587–588; *Virginia Electric and Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 534; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 248–249; *Na-*

tional Labor Relations Board v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282, reversing, 116 F. (2d) 350, 355 (C. C. A. 7).

2. Since the decision of this Court in *National Labor Relations Board* v. *Southern Bell Telephone and Telegraph Co.*, 319 U. S. 50, all of the Circuit Courts of Appeals, except that for the Seventh Circuit, which have considered problems arising from a successor to a company-dominated union, have sustained the Board. Thus, all the cases cited by the Company (Pet. 9–10, 13–16) and the IEA (Pet. 11–18) as in conflict with the decision below, except the cases in the Seventh Circuit and one case in the Fourth Circuit which has since been superseded,[11] arose prior to the decision of this Court in the *Southern Bell Telephone* case. As was stated in the petition for certiorari in *National Labor Relations Board* v. *Keystone Steel & Wire Co., et al.*, No. 544, this Term, certiorari granted November 12, 1946, the Circuit Court of Appeals for the Seventh Circuit is alone in refusing to accept the Board's judgment in dealing with this type of factual question. The body of judicial authority with which the *Keystone* case is in conflict is now in-

[11] If it can be said that *National Labor Relations Board* v. *Clinchfield Coal Corp.*, 145 F. (2d) 66 (C. C. A. 4) (cited IEA Pet. 12, 17), is in conflict, the more recent decision in *Western Electric Co.* v. *National Labor Relations Board*, 147 F. (2d) 519 (C. C. A. 4), certiorari denied, 324 U. S. 870, places the Fourth Circuit in accord with the court below.

creased to include the decision below in the present case.

3. The Company asserts (Pet. 20–22) that the court below improperly enforced that portion of the Board's order enjoining the Company from recognizing or dealing with any other labor organization as the representative of its employees for purposes of collective bargaining unless and until such labor organization shall have been certified by the Board as such representative.

We submit that in the light of the Company's persistent predilection, as fully established by its course of conduct extending over a period of many years, for treating with organizations existing in violation of the Act, and thereby thwarting its employees' attempts at self-organization for collective bargaining, the order represents a proper exercise of the broad discretion, which this Court has repeatedly stated is lodged in the Board, to fashion remedial measures necessary to expunge the effects of unfair labor practices similar to those found by the Board to have been committed by the employer in the past. See *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600; *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 390.[12]

[12] The Circuit Court of Appeals for the Third Circuit, upon a showing in a contempt proceeding that an employer,

Whether or not, as the Company argues (Pet. 21), compliance with the Board's order may result in a "serious conflict" with the wishes of its employees cannot be ascertained until the employees are freed from the compulsions inherent in the long continued domination of their bargaining relationship by the Company. Also without substance is the Company's further contention (Pet. 21) that the order will have the effect of suspending for a time, contrary to the purely literal requirements of the Act, collective bargaining between it and its employees. The Board, with the approval of this and other courts, has frequently balanced conflicting objectives of the Act and arrived at an accommodation between them which insures the practical operation of the Act and the achievement of its objectives. The order here represents such an accommodation. See e. g., *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 797–798; *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U. S. 702, 705–706; *National Labor Relations Board* v. *Century Oxford Mfg. Corp.,*

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previously found to have dominated a labor organization, had engaged in similar misconduct with respect to a successor organization, entered an order, at the Board's request, similar to the instant one. The order enjoined the employer for a period of one year from recognizing any labor organization not certified by the Board. *National Labor Relations Board* v. *Jersey Maid Corp.* (entered May 2, 1941; unreported). There are no contrary decisions. See also *Matter of The Tappan Stove Co.*, 66 N. L. R. B. 759, 765–766.

140 F. (2d) 541, 542 (C. C. A. 2), certiorari denied, 323 U. S. 714; *National Labor Relations Board* v. *Appalachian Electric Power Co.*, 140 F. (2d) 217, 221–222 (C. C. A. 4).

The further contention of the Company (Pet. 21) and the IEA (Pet. 20) that this provision of the order, in effect, prohibits it from bargaining with any but a nationally affiliated union, although its employees prefer to be represented by an unaffiliated union, and thereby infringes upon the employees' right to select a bargaining representative of their own choice, is without merit. Nothing in the order prevents the employees from designating, under the procedures of the Act, an unaffiliated organization, if it is truly free. The Board has in numerous instances entertained petitions for certification of representatives filed by unaffiliated unions and conducted elections where such unions were on the ballot and, upon receiving a majority of the votes cast, were certified as the bargaining agent.[18]

4. The IEA urges (Pet. 18) that the limitation which the court below assertedly placed on its reviewing powers under the Act is "out of harmony" with the Federal Administrative Procedure Act of 1946 (c. 324, Public Law 404, 79th Cong., 2d sess.). We have already indicated (*supra*, pp. 24–26) that the court exercised its

[18] National Labor Relations Board, *Tenth Annual Report* (Gov't Printing Office, 1945), pp. 10, 86, 87.

reviewing powers in a manner wholly consistent with the National Labor Relations Act and the decisions of this Court. Furthermore, the Administrative Procedure Act, as pointed out by the Government in its Brief (pp. 45–57) in *United States* v. *Joseph Ruzicka et al.*, No. 54, this Term, to which we respectfully refer the Court, is not applicable to the instant proceedings because they were pending prior to the enactment of this Act. Moreover this Act, if applicable to the instant proceedings, does not require a different conclusion than the one reached here by the court below.

5. The IEA asserts (Pet. 20) that the Board's order requiring the Company completely to disestablish the IEA as the bargaining representative of the employees constituted an arbitrary and unwarranted abuse of discretion on the part of the Board because it is "in effect an order of dissolution inasmuch as the Board has made it a firm policy never to certify a disestablished union." The authority of the Board in this respect is firmly established. *National Labor Relations Board* v. *Falk Corporation*, 308 U. S. 453.

CONCLUSION

The decision of the court below is, in our judgment, entirely consistent in all respects with principles previously announced by this Court. However, in view of the pendency of *National Labor Relations Board* v. *Keystone Steel & Wire Company, et al.*, No. 544, this Term, certiorari

granted, November 12, 1946, which is in conflict with the decisions of the other circuit courts of appeals (including the court below) which have dealt with the question of the conclusiveness of the Board's findings as to company-domination of successor unions, this Court may deem it appropriate to defer action upon the present petitions pending consideration and decision of the *Keystone* case.

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FEBRUARY 1947.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * * * *

SEC. 10. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue

and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred. * * * No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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